BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)	
	)	
VEOLIA ES TECHNICAL SOLUTIONS, L.L.C.	)	
	)	TITLE V Appeal No. _____
Permittee	)	
	)	
Air Pollution Control Title V Permit to Operate Permit No. V-IL-1716300103-2014-10 Docket No. U.S.EPA-R05-OAR-2014-0280	)	

PETITION FOR REVIEW

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I. INTRODUCTION

The Title V permit issued by Region 5 to Veolia suffers from two fatal flaws, either of which are enough to warrant permit revision by this Board or remand for further proceedings. First, Region 5 admits that the permit fails to comply with a primary Clean Air Act requirement:

> EPA has determined that current information demonstrates that the [permit's Operating Parameter Limits] OPLs cannot assure continuous compliance with the [Hazardous Waste Combustor] HWC NESHAP emissions limits in this case.

Response to Comments ("RTC") at 114 (emphasis added). Under 40 C.F.R. § 71.6(a)(1), Region 5 is required to issue a permit that "assure[s] compliance with all applicable requirements at the time of permit issuance." § 71.6(a)(1) (emphasis added). Region 5 has therefore admitted that the Title V permit it issued to Veolia on January 18, 2017, does not comply with the law.

Veolia wishes to be clear. Veolia has provided all of the information required under the Hazardous Waste Combustor Maximum Achievable Control Technology ("HWC MACT") rule to enable Region 5 to issue a lawful permit. Veolia strongly disagrees with Region 5's belief that this information is insufficient. But, if Region 5 truly believes that it lacks the information necessary to assure compliance now, it is admitting that the permit it has just issued is unlawful. The only lawful method to set operating parameter limits ("OPLs") is the method required by the HWC MACT, and used by Veolia (along with every other HWC in the nation), that establishes OPLs through comprehensive performance tests ("CPTs"). Moreover, Region 5's insistence that Veolia use alternative methods of setting OPLs is not supported by substantial evidence and is arbitrary and capricious for several reasons—chiefly, because Region 5 requires Veolia to use unverified devices and non-compliant methods that have not been subject to proper rulemaking.

Second, Region 5 has also undermined the compliance method set forth in the HWC MACT for establishing OPLs. Pursuant to the HWC MACT, emissions sources must set OPLs

through performance testing—specifically, CPTs. OPLs govern the operation of HWCs to "assure compliance" with emissions limits. All HWCs, including Veolia, must use this compliance method. Notwithstanding this bedrock principle of the HWC MACT, Region 5 has significantly undercut the core methodology of developing and complying with OPLs by forcing Veolia to install costly (over $2 million) and unverified multi-metals monitors on all three of its incineration units in an after-the-fact effort to modify Veolia's OPLs for metals. Region 5 lacks the legal authority and substantial factual basis to require these monitors. Neither the HWC MACT nor Title V vests Region 5 with the legal authority to force Veolia to purchase and install these monitors, and Region 5's permitting decision to require them is based on unproven, unfounded and erroneous allegations of non-compliance by Veolia.

Veolia has consistently demonstrated compliance with all applicable regulations, including metals emissions limits. Since before issuance of the draft permit, Veolia has tried to compromise with Region 5 by offering to install additional pollution control equipment that actually reduces metals emissions to levels even lower than Veolia's existing compliant levels (instead of just monitoring them) and has also offered to work with Region 5 to further progress continuous-metal-monitoring technology. However, Region 5 failed to respond to Veolia's offers of compromise. Late in the afternoon on January 17, 2017, Region 5 notified Veolia, after 14 months of silence, that it was going to issue the final permit with the unlawful multi-metals monitor requirements. Abruptly on January 18, 2017, Region 5 issued the permit. Unfortunately, the final permit included the unverified multi-metals monitors, and failed to include many negotiated terms agreed to by both parties since the issuance of the draft permit.

Because of the clear legal and factual errors inherent in the final permit, the EAB must remove the unlawful and unsupported conditions or remand the permit for further consideration.

II. PROCEDURAL AND REGULATORY BACKGROUND

A. CPTs, OPLs, and FAPs are the Required HWC MACT Compliance Method

Veolia operates three commercial hazardous waste incinerators in Sauget, Illinois. Veolia's facility is subject to the HWC MACT rule set forth in 40 C.F.R. Part 63, Subpart EEE. The HWC MACT rule controls the emission of hazardous air pollutants ("HAPs") from incinerators, cement kilns, and other combustors of hazardous waste. The emission limits developed under the HWC MACT, including those for metals—mercury, semi-volatile metals ("SVMs"), and low-volatility metals ("LVMs")—are based on actual emissions achieved during performance testing using EPA-required methods. Performance tests also are the way USEPA has prescribed sources verify compliance and monitor metals emissions under the rule. The HWC MACT does not require continuous emission monitoring for metals. Rather, Veolia and other hazardous waste incinerators run comprehensive performance tests ("CPTs") and confirmatory tests to ensure compliance. 40 C.F.R. § 63.1206(b)(2), § 63.1207. Incinerators use data developed from the CPTs to set OPLs that govern how much waste is fed into a unit and how that waste is burned. To comply with its OPLs, a source must also characterize the waste before it is burned to determine its chemical composition. 40 C.F.R. § 63.1209(c). The analysis process is directed by a feedstream analysis plan ("FAP"). The FAP provides the protocol for analyzing waste so that the incinerator operator can burn the waste in accordance with the OPLs.

B. Region 5 as Title V Permitting Authority Over Veolia

There are only three commercial HWCs located in Region 5: Veolia, Ross Incineration Services, Inc. ("Ross"), and Heritage-WTI, Inc. ("Heritage"). Of these three facilities, Region 5 has direct Title V permitting authority over Veolia only—the others are permitted by Ohio EPA. Ross and Heritage have each paid hundreds of thousands of dollars in penalties to Region 5 to settle alleged environmental violations. Conversely, Veolia has not paid any such penalties or

had to perform any actions for environmental violations. However, Veolia finds itself to be the only HWC in the country permitted directly by a USEPA Region (as opposed to a state agency) and the only HWC in the country required to install unproven and unverified multi-metals monitors to supplant OPLs. This situation did not result from Veolia's actions; rather, this situation resulted from nearly two decades of mishandling of the Title V permitting process.

Veolia submitted its original application for a Title V operating permit to the Illinois Environmental Protection Agency ("IEPA") in 1995. IEPA failed to issue a draft Title V permit until 2003 and ultimately never issued a final permit to Veolia. After multiple lawsuits by the Sierra Club *against USEPA*, Region 5 finally took over permitting authority from IEPA for Veolia in 2006 as a part of a settlement agreement. Region 5 issued Veolia's first Title V permit in September of 2008, 13 years after Veolia submitted its application. *See* Veolia Comments ("VC") at VES 019503-506. Veolia's September 2008 Title V permit did not include OPLs for metals. As a result, over the next four years, at Region 5's direction, Veolia submitted several applications for significant modification to add OPLs for metals to its permit.[1] Region 5 never took action on these applications. Eventually, in December of 2012, Veolia withdrew its request to add metals OPLs, pointing out to Region 5 that Veolia's deadline for applying to renew its Title V permit was April of 2013 and Veolia was required to perform CPTs in September of 2013, which would produce new OPLs, including OPLs for metals. Inexplicably, in January of 2013, Region 5 moved to formally reopen Veolia's permit under 40 C.F.R. § 71.7—even though the permit was set to expire in less than 9 months. Region 5's stated purpose for the reopening was to add metals OPLs, and two entirely new conditions to Veolia's permit: (1) a more stringent and onerous FAP ("enhanced FAP") and (2) a first-of-its-kind requirement that Veolia install an

[1] During this timeframe, Veolia followed the HWC MACT by filing and operating under a Notice of Compliance ("NOC") containing OPLs using its most recent CPT data. *See* 40 C.F.R. § 63.1210(d).

Xact 640 multi-metals continuous emissions monitor (a multi-metals CEMS) on each of its three incinerator stacks. Veolia filed extensive comments and participated in the public hearing. However, after the close of the public comment period, Region 5 abandoned its efforts to reopen the permit—causing both parties to have wasted time, resources and hundreds of thousands of dollars on a process that achieved nothing and went nowhere. VC at VES 019506-522.

C. Basis of the Current Dispute

As required by the HWC MACT, Veolia conducted and passed all of its CPTs in 2013 and timely applied to renew its Title V permit. Region 5 issued a draft Title V permit for public comment in October of 2014. The draft permit included the requirements from the reopening for an enhanced FAP and the installation of multi-metals CEMS on each of Veolia's three incineration units. Veolia timely submitted comments in December of 2014. After the close of the comment period, Veolia and Region 5 entered into lengthy negotiations where Veolia offered to install additional pollution control equipment and implement many of the additional enhanced FAP provisions. In addition, Veolia offered to assist Region 5 with further developing continuous emission monitoring technology for metals. Veolia met with the Deputy Regional Administrator of Region 5 on several occasions during this period and believed a settlement was within reach that would achieve Region 5's goals. However, Region 5 abruptly negated the gains made during these negotiations when on January 18, 2017, Region 5 issued the final Title V permit in much the same form as the draft October 2014 permit, including requiring Veolia to install multi-metals monitors and implement new FAP provisions. As set forth in Veolia's comments and in this petition, the inclusion of these requirements, and Region 5's permit decisionmaking process as applied to Veolia, are unlawful and unsupported.

III. JURISDICTION, STANDING AND AUTOMATIC STAY

A. Jurisdiction and Standing

Veolia satisfies all requirements for review. The permit was issued on January 18, 2017, and is final for the purposes of review under 40 C.F.R. § 71.11(i) and (l). Petition for review was filed within 30 days of issuance and notice. Veolia has standing because it participated in the public comment period. 40 C.F.R. § 71.11(l)(1). Veolia has standing to seek review of specific issues raised in this petition because Veolia raised those issues during the public comment period and preserved those issues for review. *See* VC at VES 019493-614 and attachments at VES 000001-019492. Finally, Veolia has standing to challenge new issues because those issues were not reasonably foreseeable at the time of public comment under 40 C.F.R. § 71.11(l)(1); *In re Peabody W. Coal Co.,* 15 E.A.D. 757, 760-61 (EAB 2013).

B. The Automatic Stay Applies to the Permit

Pursuant to 40 C.F.R. § 71.11(i)(2), the specific terms and conditions of the permit that are the subject of the request for review are automatically stayed. *See* 40 CFR § 71.11(i)(2)(ii). Veolia is specifically appealing Section 2.1(D) and Section 2.7.[2] In addition, in this case, the automatic stay applies to the permit in its entirety due to defects in the notice and comment process set forth in Part V, Section H below.

IV. STANDARD OF REVIEW

Review may be granted if the permitting authority's decision was based on a clearly erroneous finding of fact or conclusion of law. 40 C.F.R. § 71.11(l)(1)(i). Moreover, novel issues challenged in this petition are not "issues that are fundamentally technical in nature,"

[2] Veolia requested the deletion of this condition because there are no CO and NOx performance testing requirements for the boiler and CO and NOx are already measured annually. VC at VES 019607; Permit at 127-28.

where Region 5 has "specialized expertise and experience." *In re Peabody W. Coal Co.,* 12 E.A.D. 22, 33-34 (EAB 2005). Rather, the issues presented are legal, policy, and discretion related. To the extent any technical issues are presented, Region 5 demonstrated bias and relied upon and adopted, without adequate analysis, opinions of a third-party commercial vendor, Cooper Environmental Services LLC ("CES"), who had financial incentives to present technical issues in an unfair fashion. Therefore, the EAB owes no deference to Region 5's technical interpretations. The EAB should review Region 5's decisionmaking because of its critical importance not only to Veolia, but also to the administration of the Title V program and the HWC MACT to which Veolia and all other HWCs are subject.

V. DISCUSSION

Per 40 C.F.R. § 71.11(l)(1), the arguments set forth herein were first raised by Veolia during the public comment period. Each section heading below is footnoted with the specific portions of Veolia's Comments ("VC") pertinent to Veolia's argument and also the corresponding references to Region 5's Response to Comments ("RTC"), if Region 5 responded. To the extent Veolia's arguments raise issues not specifically set forth in Veolia's comments, it is only because those issues were not reasonably ascertainable during the public comment period.

A. The Final Permit Fails to Assure Compliance at the Time of Issuance[3]

40 C.F.R. § 71.6(a)(1) states that a final Title V permit must include limitations and standards, including operational requirements, that "assure compliance with all applicable requirements *at the time of permit issuance*." (emphasis added). By its own admission, Region 5 has failed to comply with this standard. In the RTC, Region 5 has concluded that the OPLs and feedrates developed through Veolia's CPT are insufficient to assure compliance: "EPA has

[3] VC at VES 019524, 019535, 019551, 019610-11; RTC at 15-16, 66, 114.

determined that current information demonstrates that the OPLs cannot assure continuous compliance." RTC at 114; *see also* RTC at 15-16, 66. In fact, Veolia has demonstrated that the OPLs in the final permit comply with the HWC MACT because they do assure compliance. Veolia therefore vigorously disagrees with Region 5's conclusion as is evident in its comments and throughout this long permitting process, and believes that Region 5 can issue a lawful permit based on Veolia's CPT results developed in compliance with the HWC MACT. However, Region 5 believes that the OPLs do not assure compliance at the time of permit issuance. In view of its own conclusion, Region 5's issuance of the final permit is a violation of § 71.6(a)(1). The EAB should remand the permit so that the present OPLs can be confirmed.

B. Region 5 Rewrites the HWC MACT Without Proper Rulemaking[4]

Region 5 seeks to justify imposing the enhanced FAP and multi-metals monitors on Veolia alone to establish a "correlation" between feedrates of waste into the Veolia incinerator units and corresponding emissions from those units, claiming that Veolia differs from all other HWCs in the Region in both waste variability and variability in CPT emission results. This justification fails for two reasons: (1) its underlying premises—Veolia's variabilities—are simply wrong and (2) the monitoring information (even if it were valid, which it will not be as discussed *infra* in Section G) will not create the "correlation" Region 5 desires. Thus, the only lawful way for Region 5 to impose the enhanced FAP and multi-metals monitors is to promulgate revisions to the HWC MACT for all sources. VC at VES 019549, 019554-55.

In Veolia's case, Region 5 has altered how OPLs, including feedrates, are established under the HWC MACT by adding an unclear and vaguely defined "system" whereby a multi-metals monitor must be employed to create a correlation that will be used to define OPLs,

[4] VC at VES 019527, 019532-36, 019549-50, 019554-55, 019561-63, 019580, 019590, 019592-94, 019601-04; RTC 14, 23, 140-41.

including metals feedrates. Statement of Basis ("SOB") at 54; RTC at 117. Region 5 asserts that the existing FAP/OPL system in the HWC MACT does not properly function to "assure compliance." However, the reasons cited by Region 5 in the SOB and in the RTC for imposing these on Veolia alone—including but not limited to variability of emissions and waste streams—are true for all HWCs subject to subpart EEE. For example, publicly available data from CPTs run by both commercial and captive incinerators shows that the emissions from Veolia's incineration units during CPTs are in no way outliers among similar facilities. *See* Exhibit 1 (showing statistical analysis of CPT results from HWCs). Rather, contrary to Region 5's assertions, Veolia's units are the same as other facilities when it comes to emissions variability. In addition, Region 5's determination that the waste Veolia receives is more varied than other incinerators is flawed. Region 5 erroneously alleges in the RTC that its review of waste profiles shows that Veolia's waste streams are more variable than similar HWCs like Ross and Heritage. RTC at 140-41. Region 5 suggests that it compared waste profiles received by Ross, Heritage and Veolia that are available from the EPA RCRAInfo System, but, while Region 5 states that this comparison "refutes" Veolia's argument that it is similar to other incinerators, Region 5 provides no analysis, explanation or support for this purported "refutation." RTC at 141. Table 2 from the RTC is not even based on the RCRAInfo System materials that Region 5 cites; rather Region 5 confusingly states that the table derives from "NEIC data." *Id.* The table also offers no data at all for Ross and is statistically flawed by comparing three years of Veolia data against only one year of Heritage data with no variable controls. Moreover, comparing three years of projected Heritage profiles against three years of Veolia profiles shows that Heritage has four times as many profiles as Veolia. *See id.* Region 5 also refuses to consider evidence submitted by Veolia, at Region 5's request, that shows Veolia, Heritage and Ross all service the same

industries and often the identical customers with identical types of waste.[5] Region 5 cannot credibly assert that Veolia is an outlier from all other HWCs in variability of emissions and waste received.

Thus, Region 5's assertions that the existing FAP/OPL system in the HWC MACT is deficient based on these findings is really a veiled claim that all sources with Title V permits that utilize the current compliance and monitoring methods are failing to "assure compliance" with the Clean Air Act. In an attempt to "fix" these perceived problems, Region 5 has created a new compliance and monitoring scheme that uses an enhanced FAP and multi-metals monitors. Region 5 first sought to include this scheme for direct compliance in the draft permit (SOB at 54) and later switched to utilizing it only for establishing a "correlation" between feedrates and emissions in the final permit (RTC at 43). Yet, the final permit does not mention this correlation and does not clearly state how, if established, it would be used to change Veolia's OPLs.

Indeed, Region 5 itself is confused about the nature of the correlation it seeks; the RTC states that the goal is a "statistically sound" correlation (RTC at 38, 117), but a "simple linear calculation" won't work (RTC at 68). There are also no directions in the final permit or in RTC that explain what happens if a correlation that is acceptable to Region 5 cannot be established. What then? Do multi-metals CEMS become the permanent compliance mechanism? Will sources need FAPs and OPLs at all? What will work? These are important policy questions that should be clarified by Region 5 as they impact all sources subject to the HWC MACT, not just Veolia. In sum, by undermining and then redefining how the core compliance mechanism of the HWC MACT functions, Region 5 is impermissibly seeking to create new substantive requirements that would affect all HWCs. This is far beyond the scope of Region 5's case-by-

[5] Letter from D. Harris (Veolia) to R. Kaplan (Region 5), Apr. 14, 2015, EPA-R05-OAR-2014-0280-0118.

case authority under CAA §504(a) and (c) and 40 C.F.R. §71.6(c) and can only be done through broader rulemaking by USEPA under CAA §112.

C. The Permit Compares Averages to Averages Which Masks Variability and Defeats Region 5's Alleged Reason for the Monitoring Devices[6]

The permit's reporting requirements will not correlate waste feed to emissions in a manner that will allow for statistically sound adjustments to the OPLs. The multi-metals monitoring device must collect at least one measurement for each successive 15-minute period. Permit at 36. The only method for making accurate comparisons between the data collected every 15 minutes by the monitoring device and feedrate data is to use the same 15-minute block of time. Yet, Region 5 does not intend to compare the same 15-minute block of time. RTC at 167-68. Rather, Region 5 intends to compare 1, 6 and 12 hour averages with performance data and/or feedrate averages of the same duration. *Id.* Comparing averages with averages masks variability and defeats the very purpose Region 5 claims is the reason for the multi-metals data. Further, rolling averages cause individual data points to no longer be independent. If Region 5 is truly trying to determine whether a relationship exists between feedrate and emissions, Region 5 should be making direct comparisons between 15 minute readings. Averages among individual readings dilute the effect and disassociate the cause/effect found in individual readings. Similarly, the longer the rolling average, the more diluted the cause/effect found in individual readings. The only reason Region 5 would require Veolia to record and report a 12-hour rolling average is for a direct measure of compliance.[7] But, the data cannot lawfully be used for compliance since the feedrate data is established through Method 29 (see immediately below)

[6] VC at VES 019563-64; RTC at 57-58, 102, 107-109, 167-168.

[7] 40 C.F.R. §§ 63.1209(l) and (n) require HWC incinerators such as Veolia to demonstrate compliance with metals emission standards by establishing and complying with 12-hour rolling average feedrate limit OPLs. The feedrate limit is established during the CPT.

and the multi-metals monitoring device is non-Method 29 compliant. RTC at 8 n.1. Thus, Region 5's reporting requirements are not only confusingly inadequate, they are seeking to monitor compliance in an unlawful manner.[8]

D. The Permit Unlawfully Requires the Use of Data from Non-Method 29 Compliant Multi-Metals Monitors to Determine the Accuracy of OPLs in the Permit Set by CPTs Utilizing Method 29[9]

EPA Method 29 provides the requirements and procedures that were used to develop the data used to set the metal standards in the HWC MACT. VC at VES 016972. A source must follow Method 29 when conducting CPTs to establish the HWC MACT emissions standards for mercury, SVMs, and LVMs. *See* Permit at 75-76; RTC at 64. Courts have found that compliance with emissions standards should be shown by using the same methods used to develop the standards. *See Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 396 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974). Region 5 agrees,[10] but fails to understand that its permit requirements violate this scientifically-sensible standard. RTC at 45. Veolia is required by the HWC MACT to demonstrate compliance and create OPLs by using only Method 29 procedures, the procedures used by USEPA in setting the HWC MACT standards. Since Method 29 was used to establish the metal standards in the HWC MACT, Method 29 is the only way a facility can and should show compliance. The non-Method-29-compliant multi-metals monitors cannot

[8] Region 5 acknowledged it may have caused confusion in the draft permit by referring to the monitoring devices as "multi-metals CEMS" or "CPMS"—i.e., compliance devices. 40 C.F.R. § 63.2; RTC at 8 n 1. Region 5 revised its language when it changed the purpose of the devices from being used for compliance to not being used for compliance. RTC at 165. However, Region 5 is still using the data to initiate corrective actions, as if the devices were being used for compliance. Thus, Region 5 is improperly (and confusingly) using a semantic change to bypass the legal requirements necessary to implement a compliance device. *See infra* Part V, Section D.

[9] VC at VES 016972, VES019535-536; RTC at 45.

[10] Region 5 stated that "if a test method is 'method defined' … then it is important that compliance be determined using the same method used to develop the standards." RTC at 45.

be used directly for compliance or indirectly to establish OPLs because Veolia must demonstrate compliance through Method-29-compliant CPTs.

E. The HWC MACT and Title V Do Not Authorize Region 5 to Force Veolia to Implement an Enhanced FAP and Install Multi-Metals Monitors[11]

In the Statement of Basis, Region 5 asserted it had the authority under 40 C.F.R. § 63.1209(g)(2) and § 114(a) of the Clean Air Act to impose multi-metals monitors (identified as CEMS in the SOB) and cited § 504 of the CAA and 40 C.F.R. § 63.1209(c) for its authority for the enhanced FAP. SOB at 46, 47. Veolia's comments provided both legal and factual reasons that these provisions did not authorize the enhanced FAP or the multi-metals monitors. VC at VES 019522-32. Region 5 has now dumped § 114(a) as support and stated that its authority for both onerous requirements comes from 40 C.F.R. § 63.1209(g)(2) and 40 C.F.R. § 71.6(c). RTC at 11, 38-43. Often repeated throughout the RTC, Region 5 now asserts that § 63.1209(g)(2) supports its action, unless it doesn't, in which case Region 5 argues that the general provisions of § 71.6(c) will suffice. Both assertions are legally incorrect and must be rejected.

1. § 63.1209(g)(2) Does Not Allow Multi-Metals Monitors and Enhanced FAPs[12]

Subsection (g)(2) simply does not authorize Region 5 to create the type of extensive, expensive, burdensome, and wholly new requirements that it proposes for Veolia. Rather, (g)(2) was added to ensure that permitting authorities have the flexibility to use the operational conditions within facilities as a type of "workaround" when direct measurement of emissions is not possible. This is evidenced by the multiple references to Subsection (g)(2) in the supporting documents to the HWC MACT that Veolia cited in its comments. VC at VES 019527-29. All of these references show that (g)(2) was intended to be used as a routine and unobtrusive permitting

[11] VC at VES019522-532; RTC at 11, 38-43, 46-47.
[12] VC at VES 019527-533; RTC at 38-43.

tool to control emissions by monitoring and limiting various parts of existing combustor operations, e.g., limiting the maximum pH of wet scrubber liquid to ensure compliance with the mercury standard or limiting minimum nozzle pressure to ensure adequate PM control. *See* VC at VES 019528. Region 5 also cited numerous examples in its RTC showing the same function of Subsection (g)(2), including authorizing permit writers to adopt operating parameters for baghouses and ESPs and providing them the authority to modify certain portions of test plans.[13] Region 5 also points to two state-issued Title V permits and one Region 5 NOV/FOV as support for its authority under Subsection (g)(2); however, like the examples cited above from the HWC MACT supporting documents, the permits and NOV/FOV all show that this authority is being exercised over existing operations like quench temperatures, voltage levels of various equipment, and pressure drops across control equipment, and not to require all new multi-million dollar monitoring systems. *See* RTC at 39, n.19. None of the sources cited by Region 5 and Veolia authorize, or even suggest, that a permitting authority can use Subsection (g)(2) to create entirely new operations not already a part of the combustor for the purposes of creating a parameter and an accompanying limit. Yet, this is exactly what Region 5 has done with the enhanced FAP and multi-metals monitors.[14] Subsection (g)(2) does not give Region 5 unfettered authority to demand a permittee take any actions it deems appropriate.

Finally, Region 5 argues in the RTC that all of the examples from the HWC MACT raised by Veolia are based on the "first clause" of Subsection (g)(2) and that Region 5's authority actually comes from the "second clause." RTC at 42. Region 5 understandably does not cite any

[13] NESHAPs: Stds for HAPs for HWCs, 66 Fed. Reg. 24,270, 24,271 (May 14, 2001); NESHAPs: Final Stds. for HAPs for HWCs, 70 Fed. Reg. 59,402, 59,429 (Oct. 12, 2005).

[14] The heading of 40 C.F.R. § 63.1209(g) is "Alternative monitoring requirements other than continuous emissions monitoring systems (CEMS)." (emphasis added). Despite Region 5's attempt at a midcourse name change for the purposes of legalizing its permitting action, the multi-metals monitoring device is a CEMS. Thus, Region 5's entire premise that (g)(2) authorizes the multi-metals monitor is legally flawed.

support for this "second clause" authority—because there is none. Region 5's interpretation of Subsection (g)(2) is new and inconsistent with prior implementation and interpretation of these sections and is therefore legally flawed and does not support the inclusion of the enhanced FAP or multi-metals monitors in Veolia's Title V permit.

2. Region 5's Permitting Actions Exceed Its Authority Under Title V[15]

There are three "steps" in 40 C.F.R. § 71.6 that set forth and limit a permit writer's authority provided for in § 504 of the Clean Air Act: (1) the writer must ensure that monitoring requirements provided for by the substantive emission rules (here the HWC MACT) are set forth in the Title V permit; (2) if the substantive emission rule does not contain periodic monitoring, the writer has an obligation to add requirements; and (3) if the rules provide for some periodic monitoring, the writer must make a determination as to whether the monitoring is inadequate, and, if so, add requirements. *See* SOB at 46; VC at VES 019523-24. Region 5 asserts that the requirements of the enhanced FAP and multi-metals monitors are provided for by §63.1209(g)(2) of the HWC MACT and therefore Region 5 is simply adhering to its obligation to set forth those requirements in Veolia's Title V permit via "step 1." RTC at 11.

However, as set forth above and in Veolia's comments, subsection (g)(2) does not authorize the enhanced FAP and the multi-metals monitors. Region 5 expressly recognizes this by qualifying its perceived authority under (g)(2) by stating that if its (g)(2) authority is "insufficient to impose these monitoring requirements," then it will use its authority under 40 C.F.R. § 71.6(c)(1) (as derived from 504(c) of the Clean Air Act). RTC at 40, 164. With this qualification, Region 5 turns to step 3 and the provisions of §71.6(c)(1) for support.

[15] VC at VES 019502, 019522-532; RTC at 8-12.

The D.C. Circuit Court of Appeals has interpreted § 70.6(c)(1)[16] as serving as a "gap-filler" to steps 1 and 2; providing a mechanism to ensure that permits contain "sufficient" monitoring when steps 1 and 2 do not apply and the monitoring requirements set forth in the underlying standard are "inadequate." *Sierra Club v. E.P.A.*, 536 F 3d 673, 680 (D.C. Cir. 2008). The monitoring provisions of the HWC are not inadequate generally and they are not inadequate as applied to Veolia. VC at VES 019524-25. The HWC MACT provides periodic monitoring through feedstream analysis and CPTs that permitting authorities have deemed acceptable for every other source in the United States subject to the rule. Region 5 has provided no support to suggest otherwise. Similarly, Veolia vigorously complies with the monitoring provisions of the HWC MACT by characterizing all of its waste via its FAP and by conducting performance tests to show compliance. Region 5's site-specific assertions in the RTC and SOB to the contrary are factually flawed, as set forth in detail in Section G of this discussion, and do not show that the monitoring provisions at Veolia are inadequate.

Even if Region 5's assertions had merit, which they do not, §71.6(c)(1) does not authorize the monitoring that Region 5 requires. Title V does not include the authority to create wholly new substantive requirements. VC at VES 019502; *Sierra Club,* 536 F.3d at 675. Rather, Title V limits the permitting authority to only those requirements that "assure compliance"—i.e., gap-filling authority. VC at VES 019522-23; *Sierra Club,* 536 F.3d at 680. The enhanced FAP and the multi-metals monitors go beyond this limit and create wholly new substantive requirements that are not found anywhere in the statute, the regulations, or even in practice on any currently-permitted HWC and thus are not allowed by 40 C.F.R. § 71.6(c) and CAA § 504(c).

[16] 40 C.F.R. § 70.6(c)(1) and §71.6(c)(1) are identical provisions.

F. Region 5's Decision is Constitutionally Inadequate As Applied to Veolia[17]

Region 5's administrative decisionmaking process, including, but not limited to its "site-specific findings" concerning Veolia, are unconstitutional as applied to Veolia because they do not give Veolia an adequate opportunity to contest the alleged violations of the Clean Air Act that Region 5 "bootstraps" into a justification for large portions of the final permit, including the enhanced FAP and multi-metals monitors. Veolia's sole business is to destroy hazardous waste in a safe and effective manner by incinerating that waste. Under § 502 of the CAA, Veolia cannot operate its incinerators without a valid permit. *See* 42 U.S.C. § 7661a. While the CAA contemplates that sources required to have permits may be permitted by state regulatory agencies with delegated programs, Region 5 has taken over the Title V permit process as it relates to Veolia. Veolia cannot obtain a Title V permit from any other authority other than Region 5. Thus, Region 5 holds a unique and powerful authority over Veolia's sole business activity. As noted in Veolia's comments, and the SOB and RTC (RTC at 19-22), Region 5 has subjected Veolia to a barrage of enforcement actions beginning with a 2006 FOV and continuing with a half-dozen CAA §114 information requests and FOVs/NOVs in 2008 through 2012. In each instance, Region 5 alleged significant violations of the CAA or asserted that violations formed the basis of the Agency's requests for information. However, also in each instance, Region 5 provided little or no factual support for its assertions and failed to substantively respond to Veolia's responses refuting the Agency's accusations. Region 5 also has carried on this process in a manner that ensured Veolia could never obtain judicial review of these allegations. The Agency's actions are an unlawful and inappropriate use of the Title V program that has violated Veolia's due process rights. *See Bell v. Burson*, 402 U.S. 535, 539 (1971) (holding that once

[17] VC at VES 019589-590.

issued, the existence of a permit may become essential to the holder, and therefore is "not to be taken away without that procedural due process" required by the Constitution). The final permit's conditions gravely threaten Veolia's ability to carry on its business. Under the guarantees of the Fifth Amendment to the U.S. Constitution, Region 5 cannot take these actions and deprive Veolia of its protected interests "without due process of law." U.S. Const. amend. V; *Bell*, 402 U.S. at 539.

The procedures for processing a Title V permit renewal are included in 40 C.F.R. §71.7(a) and Subsection 71.11 and mirror those associated with the familiar "notice and comment rulemaking" under the Administrative Procedure Act. 5 U.S.C. § 553. While these procedures offer sufficient due process protection in most instances, they are inadequate as applied to Veolia in these circumstances. The § 553 procedures are designed to ensure public participation in the Agency's decisionmaking and they offer protection at a level consummate with participation by any member of the general public. However, they are inadequate as applied to Veolia when the Agency is basing its permit decision on specific, unsubstantiated allegations regarding Veolia's compliance history. While Veolia has participated in the process through these comments and the public hearing, it has no opportunity under these procedures to engage in fact-finding or other discovery regarding the allegations being made against it. Veolia also has had no opportunity to conduct cross-examination or otherwise to test the evidence against it in the presence of a neutral fact-finder. Although the procedures in 40 C.F.R. § 71.11 and § 307(b) of the CAA allow appeals to the appropriate United States Court of Appeals, this level of post-deprivation review will not provide Veolia with the fact-finding and cross-examination that is essential to due process in this instance. Finally, while Veolia raised this

argument in its comments, Region 5 did not comment or otherwise respond, therefore, the EAB should at minimum remand the permit for further consideration.

G. Region 5's Specific Findings of Fact Are Clearly Erroneous and Not Supported by Substantial Evidence[18]

Region 5's SOB is littered with clear factual errors and misleading statements, which Veolia fully addressed in its comments. Region 5 has again made significant and substantial factual errors and inaccurate findings in the RTC. The most egregious of Region 5's errors are addressed below. Even with limited space in which to refute these errors, it is clear, that taken in their totality, these inaccuracies and mistakes show that Region 5's permitting action is highly unusual, reflects extreme bias, and is not supported by substantial evidence. *See Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 261-62 (7th Cir. 1993) (finding that EPA failed to show CWA decision was supported by substantial evidence); *see also Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, 477 (7th Cir. 2009) ("[W]e are not authorized to uphold a regulatory decision that is not supported by substantial evidence on the record as a whole"). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Hoffman*, 999 F.2d at 261 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

1. The Variability of Veolia's Emissions Are Consistent with Other HWCs and Veolia's Mercury Emissions Are Very Small[19]

Contrary to Region 5's allegations, Veolia is not an outlier for emissions variability. Exhibit 1 shows that hazardous waste combustors have variable emissions and Veolia's emissions' variability falls in the middle of the range of other HWCs. Moreover, CPT test plans are specifically designed "to generate emissions under worst case operating conditions" in order

[18] VC at VES 019517, 019532-573, 019594.
[19] VC at VES 019517, 019543-44, 019549-50, 019556, 019594; RTC at 13-19, 26, 36.

for a source to "account for variability in operations (e.g., composition and feedrate of feedstreams, as well as variability of pollution control equipment efficiency)." SOB at 39 (emphasis added); RTC at 69.

Region 5 has also alleged that Veolia is a "key contributor" to mercury emissions in the Sauget, Illinois area, "an Environmental Justice community that uses neighboring lakes for local fishing." RTC at 36. This is flatly untrue. Veolia is a very small source of mercury, not only in the immediate area, but within a 50 mile radius of Sauget. *See* Exhibit 2 (showing local sources of mercury based on TRI data)[20]; VC at VES 019543. Further, a representative with the Illinois Department of Natural Resources has admitted that the lakes Region 5 alleges are impacted with mercury are connected via drainage canals to the Mississippi River. VC at VES 007607-09. 008077-79. Therefore, if the lakes are impacted (and there is little evidence that they are), the source of mercury could be miles upriver from Sauget. Region 5 also inaccurately alleges that fish advisories are in place due to high mercury concentrations. RTC 24. In reality, the fish advisories at the lakes are in place due to high PCB concentrations, not mercury, and Veolia's facility does not process materials containing PCBs. VC at VES 007608.

2. Region 5 Cannot Conclude that Veolia is Likely to Violate the HWC MACT by Making Baseless Allegations and Then Relying on Them as True[21]

Region 5 erred in relying on the unfounded claims contained in the NEIC findings and the meritless information contained in the various FOVs/NOVs because Region 5 refused to give Veolia an opportunity to challenge these erroneous findings in an appropriate review process and thus never proved them. *See WildEarth Guardians v. E.P.A.*, 728 F.3d 1075, 1083 (10th Cir. 2013) (Court agreed with EPA that "an NOV reflects the agency's first, not its last, word on the

[20] Exhibit 2 to this petition includes the original chart from Veolia's comments showing 2013 data and an updated chart providing TRI data for years 2014-15. Veolia further reduced mercury emissions in 2016 to 0.6 lbs.
[21] VC at VES019574-597, 019600-605; RTC at 19-22.

subject, marking only the beginning of a process designed to test the accuracy of the agency's initial conclusions. And that process may prove opposite: The statute contemplates that litigation may disprove the agency's allegations, may disprove the reasonableness of the agency's allegations, or may result in a stalemate or settlement.") (internal quotation marks and citation omitted); *Sierra Club v. Johnson*, 541 F.3d 1257, 1267 (11th Cir. 2008) (agreeing with EPA that earlier violation notice and civil enforcement action were not sufficient to demonstrate non-compliance because "these were merely early steps in the process of determining whether a violation had, in fact, occurred"); *Sierra Club v. E.P.A.*, 557 F.3d 401, 406-07 (6th Cir. 2009) (prior notice of violation and enforcement action by EPA did not require the EPA to object to permit request); *see also Luminant Generation Co., L.L.C. v. E.P.A.*, 757 F.3d 439, 442 (5th Cir. 2014) (notices of violation are "advisory, preliminary, and non-binding"). In addition, Region 5 admits that it is not pursuing Veolia for any violations. RTC at 142.

Region 5's reliance on these unproven FOVs/NOVs and reports is an example of bootstrapping an argument at its worst. Region 5 has stated that "*EPA has alleged* Veolia violated one or more of the requirement[s] in 2008 Part 71 permit…[therefore] there is a *possibility* that Veolia could violate the HWC NESHAP emission limits." RTC at 21 (emphasis added). Region 5's conclusion is impermissable speculation built on baseless innuendo.

Region 5 also cites to a promotional brochure authored by CES entitled "Draft Guide for Developing a Multi-Metals, Fence-Line Monitoring Plan for Fugitive Emission Using X-Ray Based Monitors" ("CES Brochure") which alleges that Veolia exceeded an arsenic concentration on April 13, 2009. RTC at 24. However, the CES Brochure was clearly designed to sell CES's Xact 625, an experimental fence-line monitor, not for identifying sources of arsenic. In addition, the CES Brochure states "the source (of the arsenic) has not been unequivocally identified" and

acknowledges "there are other viable source candidates" in the immediate area of Sauget including railways and heavy traffic, a marine shipping terminal, a number of large chemical corporations, mid-sized manufacturers, an oil supply terminal, the Dead Creek federal Superfund site, a nearby dredging operation to remove metals from a waterway, and an inactive zinc smelter which Region 5 acknowledges disposed of or released arsenic. In addition, there are two sewer-sludge incinerators in the area. Like the FOVs/NOVs, it is unreasonable for Region 5 to rely on these baseless accusations.

3. Veolia Demonstrates Compliance with the Clean Air Act through CPTs Using Method 29, the Only Promulgated Method to Establish Compliance with the HWC MACT; Conversely, the Multi Metals Devices are Approved Nowhere to Establish Anything[22]

Region 5 has held out the multi-metals monitors as a reliable monitoring device. However, multi-metals monitoring device data is not comparable to data collected by EPA Reference Method 29 used in CPTs. If Region 5 truly believed it was comparable, the Permit would not require Veolia to conduct CPTs to demonstrate compliance. In the RTC, Region 5 recognized that multi-metals monitoring devices and Method 29 are two different measurements, with different sampling systems, and Region 5 admits it is not asserting that the multi-metals monitoring device is identical to Method 29. RTC at 64, 113-14. Region 5 also admits that it "has not conducted concurrent Method 29 and Xact multi-metals monitoring device measurements at a commercial hazardous waste incinerator." RTC at 74. Yet, Region 5 ignored or discounted every sworn statement and other evidence showing that the multi-metals monitoring device and the data it provides is deeply flawed and not comparable to Method 29.[23]

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[22] VC at VES019532-42, 019551-563, 019566-573, 019580, 019599-600; RTC at 54, 56, 62, 85.

[23] Region 5 alleges it carefully reviewed "all of the reliability tests and other data submitted by both Lilly and Cooper." But, Region 5 admits it did not independently verify Lilly and Cooper's claims concerning the instrument. RTC at 77. Cooper and Lilly both had a strong financial incentive to see the device

Additionally, EPA has not promulgated performance specifications or quality assurance procedures for multi-metals monitoring devices despite the fact that it "generally has promulgated performance specifications for CEMS before they are used for compliance monitoring" (citing as an example, 40 C.F.R. § 63.8(a)(2), "which specifies that, for purposes of 40 CFR Part 63, 'all [continuous monitoring systems] required under relevant standards shall be subject to the provisions of this section upon promulgation of performance specifications for CMS.'"). RTC at 54, 61. Region 5 relies extensively upon an internal memo, the "McNally Memo," as legal authority to employ the multi-metals device without promulgated performance specifications. RTC at 54, 56, 62, 85. However, the internal McNally Memo cannot provide such authority. *See Donner Hanna Coke Corp. v. Costle,* 464 F. Supp. 1295, 1302-05 (W.D.N.Y. 1979) (rulemaking was required before non-promulgated test method could be used to determine compliance under the CAA); *United States v. Zimmer Paper Prods., Inc.,* 733 F.Supp. 1265, 1269-70 (S.D. Ind. 1989) (EPA internal memo used to interpret regulations applicable to CAA requiring regulated entity to install an expensive incinerator not "final action of the Administrator" under § 7607(b) and Court reviewed pursuant to APA due, in part, to financial impact on regulated entity).

EPA has posted to its website (https://www.epa.gov/emc/emc-other-test-methods), in the "Other Test Methods" category, performance specification OTM 16 and quality assurance procedures OTM 20 for multi-metals monitoring devices. RTC at 61. Region 5 admits "there needs to be additional work done to develop more universally applicable performance specifications with respect to both the monitoring equipment and the emission sources." RTC at

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succeed. Cooper stood to profit as the device manufacturer and Lilly had a strong financial incentive to look past the device's defects because by using the technology, Lilly was allowed by Region 5 to eliminate costly laboratory procedures and waste analysis costs. If the technology failed (or appeared to have failed), Lilly would have had to reinstitute all of its expensive waste feed analysis procedures.

53. Given this fact, these "Other Test Methods" are inappropriate for use at Veolia's incinerators or any other incinerator unless and until universal performance specifications are promulgated.[24]

In fact, the OTMs referenced in the permit were written by CES for CES's own Xact 640 device. Permit at 34-39. Yet, incredulously, Region 5 denies it is endorsing the Xact 640. RTC at 106. Region 5 candidly admits that with respect to the Xact 640, it has failed to comply with "all of its performance specifications and quality assurance procedures for CEMS through the rulemaking procedures established under the Administrative Procedure Act, as amended." RTC at 91. Region 5 also acknowledges that any proposed performance specification and quality assurance procedures for the multi-metals monitors would attract comments from a wider range of interested parties, and that a broader spectrum of comments acts to check and balance the process of promulgating a performance specification or a quality assurance procedure for a CEMS. RTC at 91-92. Thus, Region 5 admits that it will not submit CES's Xact 640 to the normal check and balance process to ensure the device's accuracy.

Region 5 is requiring the Xact 640 while denying it is doing so and alleging the Xact 640 is needed to confirm OPLs, but admitting the technology has not been vetted through normal means. By relying exclusively on the Xact technology, Region 5 is forcing Veolia to contract for business with a specific private company—CES. Veolia has expressed its concern many times to Region 5 about the improper behavior of this company and its owner. But, Region 5 has ignored these concerns and is now allowing CES to hold Veolia's business hostage.[25] Region 5's actions are, at a minimum, highly unusual.

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[24] OTM 16 and 20 were not modified in any way to accommodate for the differences between the Lilly and Veolia incinerators. *See infra* Part V, Section G.3.a.

[25] Veolia renews its requests that (1) Region 5 disclose all communications and relationships with CES and (2) that Region 5's actions be further independently investigated. VC at VES 019538, 019573.

Region 5 expects to see many installations of multi-metals devices in the near future due to technical advances gained with multi-metals monitoring device technology.[26] RTC at 70. But, if Region 5 is allowed to avoid basic, fundamental safeguards for such technology now, it could surely seek to do so in the future. Rulemaking will no longer be used or needed, as Region 5 need only simply insert such untested monitoring devices in each facility's permit as each comes up for renewal. Region 5 does not have the authority under the HWC MACT and Title V to include in Veolia's permit performance specifications and quality assurance procedures that have not been promulgated pursuant to appropriate rulemaking.

a. Eli Lilly's Incineration Unit is Not Comparable[27]

Region 5 alleges "the Act does not prohibit a permitting agency from requiring in a Title V permit the use of performance specifications that EPA has previously reviewed and approved for use in a *similar* facility." RTC at 62 (emphasis added). Without further support, Region 5 continually asserts that Veolia, a commercial incinerator, is similar to Lilly, a captive incinerator.[28] RTC at 79. Region 5 makes this comparison despite its admission that Veolia and Lilly differ significantly in the areas that matter most—the variability of the waste feed and differences in pollution control equipment. RTC at 60, 79, 80, 121. Therefore, Region 5's conclusion that monitoring equipment employed at Lilly will work at Veolia is baseless.[29]

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[26] Veolia disagrees that advances have been made. The Xact 640 is essentially the same technology which was installed and failed at Lilly some 13 years ago.

[27] VC at VES 019536-42, 019554-55, 019558-59, 019564, 019567, 019572, 019573; RTC at 23.

[28] Lilly had a consistent feedstream which contained very few, if any, metals because it is an incineration unit attached to a manufacturing facility. Veolia has variable feedstreams with some containing metals.

[29] Region 5 did not give weight to any affidavit or other evidence offered to demonstrate the Xact CEMs did not work at Lilly. Rather, Region 5 summarily disregarded Emma York's sworn affidavit and then offered its own comments with no sworn attribution as proof that the Xact CEMs worked. This tactic is used by Region 5 throughout the RTC. For instance, Region 5 relies upon Cooper's unsworn comments about the efficacy of the Xact CEMs, albeit with no further support or proof. *See, e.g.*, RTC 70, 87, 103 and 113 ("According to Cooper"); RTC 81, 88, and 103 (citing "discussions with Cooper"). However,

b. Region 5 Should Utilize Existing Data to Establish Reasonable OPLs[30]

Region 5 has no reason to foist the expensive, untested multi-metals monitoring devices upon Veolia. Region 5 has sufficient data from Veolia's 2008 and 2013 CPTs to establish reliable OPLs. The CES device is the only multi-metal monitoring device available and it is simply not ready to be used on a commercial hazardous waste incinerator. RTC at 3, 86, 106. As stated throughout Veolia's comments, the CES device, while commercially available, is not commercially viable. *See* Exhibit 3 (Test America Supp. Comm.). The CES device is not precise or robust enough to be used for compliance. Veolia and others have discussed at length why it will not work at Veolia. VC at VES 019493-614. In addition, the permit requires a minimum of 95% valid data capture of 1-hour data for each calendar month, a condition that cannot be achieved given the CES device's significant problems and limitations. Permit at 36.

4. CPTs Are EPA's Required Method for Setting Correlations Between Feedrate and Emissions Under Worst Case Scenarios [31]

Region 5 wrongfully finds that Veolia's FAP is inadequate and dismisses the validity of Veolia's CPTs as merely indicators of compliance limited only to the conditions and mixes of waste incinerated during the test. However, despite these criticisms, Region 5 has in fact concluded that Veolia's FAP does have all of the elements required by the HWC MACT. *See* VC at VES 0001293. Further, Veolia characterizes all waste it receives. *See* VES 000174-240 (Veolia Waste Analysis Plan). The truth is Veolia and Region 5 resolved several of the differences concerning the enhanced FAP during negotiations held after the draft permit was

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Region 5 ignores sworn statements and other proof that the technology does not work and will not work at Veolia. *See, e.g.,* RTC 81, 88, 103 ("EPA has not found any data that support the commenter's assertions"), *see also supra* note 23.

[30] VC at VES 019532-36, 019556-61, 019598, 019611-13; RTC at 22-23, 29.

[31] VC at VES 019532-36, 019549-50, 019611, 019564-66, 019591-92; RTC at 26, 27, 28, 33-34.

issued. Unfortunately, Region V issued the permit before Veolia and Region 5 could finalize many of these compromises.

CPTs are the bedrock method for establishing compliance with the HWC MACT. Veolia demonstrated the correlation between feedrates and emissions during the tests it conducted in 2013. Veolia set its OPLs accordingly, consistent with the mandate of the HWC MACT. CPT test plans are specifically designed to account for variability in operations, including changes in the composition of waste and feedrates. SOB at 39; RTC at 69. Emission levels achieved during CPTs are by design the highest emission levels a source emits under reasonably anticipatable circumstances. CPTs are conducted pursuant to Method 29 in a highly controlled environment where feedrates are precisely monitored, detailed and precise test methods are used to sample the stack emissions, and the results are analyzed against the known feedrates. CPTs are the best environment to determine and confirm correlations, if any, between feedrates and emissions. Given this fact, it is clear that Region 5's concerns have little to do with the specifics of Veolia's permit. Rather, Region 5 is using Veolia's permit as a vehicle to address its perceived concerns about the limitations of CPTs. These concerns must be addressed with broader rulemaking.

5. Three Non-Method 29 Compliant Multi-Metals Monitors with Unproven Functionality Pose a Significant Financial Risk to Veolia[32]

Region 5 arbitrarily and capriciously selected multi-metals devices to operate for *one-year or more* on Veolia's three incineration units. Nothing in the record supports this timeframe of operation. With regard to the multi-metals devices, Region 5 states that it "has determined that…[three are]…necessary in part because, as illustrated by the results of Veolia's past CPTs, it is not possible to predict emissions from any stack based on test results from another stack." RTC at 95. There is no basis in the record to require *simultaneous* monitoring of each

[32] VC at VES 019544-49, 019572; RTC at 34.

incinerator. Further, if Veolia is correct and these devices fail, Veolia's costs for one mobile unit that does not work would be far less than for three stationary units that do not work.[33]

H. Region 5's Substantial Changes Require the Permit be Reopened[34]

The EAB is empowered to "determine whether reopening the public comment period is warranted in a given circumstance." *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 146-47 (EAB 2006). The EAB has exercised its authority and required permitting authorities to reopen the public comment period where new conditions are added or changes made to the permit after the public comment period has closed. *Id.*; *see also In re Orange Recyc. & Ethanol Prod. Facility*, 2001 WL 36294221, at *7 (E.P.A. May 2, 2001) (notice was insufficient and additional public notice was warranted where operating conditions differed significantly from draft permit—PTE limits were discussed in public comments but final permit adopted a fundamentally different approach to PTE limits than found in the draft permit). Region 5 incorporated the following significant changes into the permit:

1) The multi-metals device is no longer a CEMS or CPMS. *See* SOB at 53-54; RTC at 164-65. It now is solely a monitoring device, not used for direct compliance. Region 5 acknowledged that "confusion may have [been] caused" by the terms "multi-metals CEMS" or "CPMS." RTC at 165.

2) Certain terminology such as "parametric range" and "parameter" changed because Region 5 admits this terminology "may have caused confusion." RTC at 166.

3) Averaging periods used to determine excursions and for triggering corrective actions and related recordkeeping were substantially revised. RTC at 167-68;

4) Region 5 is no longer relying on § 114(a)(1). Region 5 admits it had not previously described its "alternate argument regarding the use of § 504(c) of the Act and 40 C.F.R. § 71.6(c)(1)…" *Id.* NOTE: 40 C.F.R. §70.6(a)(1)(i) specifically requires Region 5 to "specify and reference the origin of and authority for each term or condition." Failure to do so is arbitrary and capricious;

[33] CES has no money-back or performance guarantees on their units. CES need not offer them when Region 5 mandates the installation of their units and CES does not have to compete in the marketplace.
[34] VC at VES 019611-019613; RTC at 12, 31-33, 60, 65, 74, 97, 104, 110-13, 149, 164-71, 185-86, 188.

5) Region 5 added substantive conditions, e.g., "data completeness criteria," that will likely result in the multi-metals device being required in excess of the 12 months originally proposed. RTC at 167. The FAP's waste acceptance procedures were altered and specific procedures and protocols were added. RTC at 169-171. Region 5 "had not specified these detailed procedures in the draft permit." RTC at 169.

6) Region 5 claimed, for the first time, it could not be sure that the Permit would assure that "emissions from Veolia's operations continuously comply with the HWC NESHAP." RTC at 12, 60. The public did not have an opportunity to comment on Region 5's belief and whether the Permit assures compliance.[35]

In this permitting action, Region 5 has admitted to sowing confusion through poor, inaccurate and misleading drafting and failing to cite any proper authority for the actions taken. Region 5 thus created "substantial new questions" rather than properly informing the public. All draft permits must be noticed and made available for public comment. 40 CFR § 71.11(a)(5), (d). "If any data, information, or arguments submitted during the public comment period appear to raise substantial new questions concerning a permit," EPA may (1) prepare a new draft permit; (2) revise the statement of basis and reopen the comment period; and/or (3) reopen or extend the comment period. 40 CFR § 71.11(h)(5). Section 71.11(h)(5) contemplates reopenings even where no changes to a permit are made. The public comment period ended on December 19, 2014. Nevertheless, Region 5 *de facto* reopened the public comment for CES and others. *See* RTC at 185-93 (submissions dated after December 19, 2014). However, Region 5 failed to formally reopen the comment period for everyone. Region 5 relied heavily upon CES supplemental comments in its RTC, but ignored or discounted supplemental comments from all other parties. *See supra* 22 n.23 & 26 n.29; RTC at 31-33, 65, 74, 97, 104, 110-13, 164. Given this *de facto* reopening and Region 5's substantial reliance upon the supplemental comments from only CES, a financially interested commenter, the comment period should be reopened.

[35] Veolia disagrees with Region 5's statement and firmly believes that the final permit's OPLs established through Veolia's CPTs comply with the HWC NESHAP and assures compliance with the CAA.

Region 5's actions also suppressed public comment.[36] The only public hearing was held outside of Sauget and none of the Illinois document repositories were located in Sauget. As a result, despite past public interest, no one from Sauget attended the public hearing.[37] *See* VES 019307 (Sign-in sheet), VES 016558-69 (Transcript). The public also did not have an adequate opportunity to comment as the new/modified conditions are not a logical outgrowth of the draft permit, nor could interested parties have anticipated these changes from the draft permit. *See* 40 CFR § 71.7(a)(1)(ii) (a permit may only be issued after compliance with the requirements for public participation under § 71.11); *Natural Resources Defense Council v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002) ("[a] decision made without adequate notice and comment is arbitrary or an abuse of discretion."); *Sierra Club v. Johnson*, 436 F.3d 1269, 1280 (11th Cir. 2006) (permit was defective due to failure to follow public participation requirements). Thus, the final permit is fatally defective and should be remanded.

VI. CONCLUSION & REQUEST FOR ORAL ARGUMENT

For the reasons set forth above, Veolia requests that the EAB remove the unlawful and unsupported conditions of the permit, remand the permit for further consideration, and take other actions as the EAB deems fair and appropriate in light of the law and facts presented.

In addition, based on the complexities of the issues raised herein and in the supporting materials, Veolia requests an opportunity for oral argument in front of the EAB.

[36] Region 5 even misidentified the location of the facility as East St. Louis. SOB at 75.
[37] EPA acknowledged in the RTC that prior public comment opportunities on Veolia's permitting actions have generated significant public interest. RTC at 149.

Respectfully Submitted,

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LIST OF EXHIBITS

1. Comparative CPT Emissions Results for HWCs: Mercury, SVMs, and LVMs.

2. Comparative Mercury Emissions for Sources Within 50 Miles of Sauget, Illinois.

3. TestAmerica Laboratories, Inc. and Focus Environmental, Inc. Responses to EPA Comments on Veolia Title V Permit (Comments Numbered 83-93)

STATEMENT OF COMPLIANCE WITH PAGE LIMITATION

Pursuant to the August 12, 2013, Standing Order titled Revised Order Authorizing Electronic Filing Procedures Before The Environmental Appeals Board Not Governed By 40 C.F.R. Part 22, this document, exclusive of the certificate of service, table of contents, subject index, and table of cases, does not exceed 50 pages in length.

CERTIFICATE OF SERVICE

I hereby certify, pursuant to the Rules of the Environmental Appeals Board of the U.S. Environmental Protection Agency, that on February 15, 2017, the foregoing was filed electronically with the Clerk of the Environmental Appeals Board using the EAB eFiling System, as authorized in the August 12, 2013, Standing Order titled Revised Order Authorizing Electronic Filing Procedures Before The Environmental Appeals Board Not Governed By 40 C.F.R. Part 22. The foregoing is also being served by next day Federal Express in hard copy paper form on the following:

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